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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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76 pp

QUESTIONS PRESENTED FOR REVIEW

1. The District Court denied the defendant's motion to dismiss for lack of a prima facie case at the close of plaintiff's case in chief, and permitted the defendant to offer evidence of its allegedly legitimate reasons for plaintiff's rejection. The question presented is whether the District Court erred in ruling that the plaintiff failed to establish a prima facie case of unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII").

2. Whether the sexual harassment of a subordinate employee by her supervisor constitutes a violation of Title VII.

3. Whether the federal courts below erred in failing to consider plaintiff's retaliation claim under Title VII.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Michaela Beresteanu Golin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on April 19, 1985.

OPINION BELOW

The Court of Appeals affirmed without an opinion the decision of the United States District Court for the Eastern District of New York. The full text of the Court order is set out in the Appendix to this petition. (App. 1a-2a).

The decision of the District Court appears in an unreported Memorandum and Order dated January 26, 1984. (App. 3a-39a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 19, 1985. (App. 1a-2a). A timely petition for rehearing with a suggestion for rehearing en banc was denied on June 18, 1985. (App. 40a-41a). On September 9, 1985, Mr. Justice Marshall extended the time within which to file a petition for

a writ of certiorari to and including November 15, 1985. (App. 42a). This petition for a writ of certiorari was filed within 60 days of the date of Mr. Justice Marshall's order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

This action involves §§ 703(a)(1) and 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3(a), respectively (App. 43a-44a); Rules 41(b) and 52(a) of the Federal Rules of Civil Procedure (App. 45a-48a); the Sexual Harassment section of the Equal Employment Opportunity Commission ("EEOC") Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)-(g) (1984) (App. 49a-53a); and the Equal Opportunity Clause of the Executive Order

11246, as amended, 41 C.F.R. § 60-1.4 (1985) (App. 54a-55a).

STATEMENT OF THE CASE

A. Existence of jurisdiction below.

The jurisdiction of the District Court rests upon § 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(3).

B. Statement of undisputed facts.

The following facts are undisputed by the parties.

Petitioner, Michaela Beresteanu Golin, received a doctorate degree (PhD) in Theoretical Nuclear Physics from Rutgers University in 1975. After a one year postdoctoral appointment at Florida State University, Golin obtained a Research Associate appointment in the Physics Department at Brookhaven National

Laboratory. (Tp. 30-40).[1]

Respondent, Brookhaven National Laboratory ("Brookhaven" or "the Laboratory"), is a non-profit institution, supported by federal contracts, and engaged in multidisciplinary research in such areas as theoretical and experimental Physics, Chemistry, Biology, Accelerator, etc. (Td. 5-6, 11).

As a federal contractor employing approximately 700 scientists, (Td. 4), Brookhaven is subject to compliance with Executive Order 11246. See, e.g., 41 C.F.R. § 60 (1985). The Executive Order imposes on Government contractors the obligation not to discriminate against

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[1] References to testimony at trial will be made to the trial transcript. The transcript of April 4, November 30 and December 7, 1983, has been sequentially numbered from 1 to 156, and will be referred to as "Tp." The transcript of December 1, 1983 has been sequentially numbered from 1 to 142, and will be referred to as "Td."

employees and applicants for employment on the basis of race, color, religion, sex, or national origin, and to implement affirmative action steps to recruit, hire and promote minorities and women. 41 C.F.R. § 60-1.4 (App. 54a-55a).

During the period of time relevant to this litigation, both the Department of Energy federal contract compliance review and the Laboratory's Affirmative Action Plan documented the Physics Department's underutilization of professional women. (Def. Ex. E, offered and admitted in evidence at Tp. 101, rel. text reproduced at App. 68a; see also Def. Ex. G, Td. 35-36, App. 72a).

"'Underutilization' is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. § 60-2.11(b) (1985). Despite advances, "much remain[ed] to be done" at

Brookhaven to "achieve equality of opportunity" for women scientists. (Def. Ex. G, Td. 35-36, App. 72a-73a).

At the Laboratory, Golin worked under the direct supervision of Dr. Sidney Kahana, the Group Leader of the Nuclear Theory Group. (Td. 25). Kahana reported directly to Dr. Nicholas Samios, the Chairman of the Physics Department. Samios in turn reported to Dr. George H. Vineyard, the Laboratory Director. Dr. Martin Blume, Deputy Chairman, assisted Samios in the administration of the Physics Department. (Td. 8, 36, 62).

As a Group Leader, Kahana had the responsibility to recommend all the employment decisions affecting his subordinates, e.g., their hiring, firing, evaluation, promotion, salary. (Td. 8-10, 23, 25, 44, 101, 115-116). Brookhaven does not publish any criteria for the evaluation of its low-level employees,

(Td. 54; Scientific Staff Manual, Def. Ex. A, Tp. 75), but relies entirely on the subjective recommendations of the individual's Group Leader. (Td. 8-10, 23, 25, 44, 101, 115-116).

As a Brookhaven Research Associate, Golin held a temporary one-year appointment, renewable up to a maximum of three years. "Research Associates are eligible, however, for term appointments in competition with candidates from other institutions." (Scientific Staff Manual, Def. Ex. A, p. 5, Tp. 75). Kahana had recommended, and obtained, such a promotion for one of Golin's colleagues, Dr. Anthony J. Baltz. (Td. 23).

Like the Research Associate positions, Brookhaven's lowest staff level or "term" appointments, are also temporary positions, renewable for a limited number of years. (Scientific Staff Manual, Def. Ex. A, p. 2, Tp. 75).

As of July 2, 1978, out of a total of 160 appointments to the permanent scientific staff, Brookhaven had only granted 2 permanent staff positions to women, i.e., approximately 1 percent. (Pl. Ex. 8, Tp. 68, App. 70a).

At trial, Samios was "somewhat surprised" that 10 to 15 percent of the Physics doctorates in the United States were held by women. (Td. 48). Blume did not know what percentage of doctorate degrees in Physics were awarded to women. (Td. 79, 81-82).

Beginning in January 1977, Golin was invited by Kahana to collaborate with him on a research project. (Td. 105). During this joint research work, Kahana subjected Golin to repeated and unwelcome sexual remarks, sexual advances, and requests for sexual favors. (Tp. 55-56). Kahana often sat next to Golin, and nudged her body with his elbow and with

his knee. (Kahana "do[es]n't remember any such advances." (Td. 107)). He repeatedly pointed to an abbreviation with obscene connotations, laughing and staring at Golin. Dr. Michel Bets testified at trial that he witnessed an incident where Kahana pinched Golin above her hip, and Golin rebuffed Kahana in public. (Tp. 6-7, 69). (Kahana does not deny Golin's public objections, does not remember touching her, and "do[es] not think [he] pinched her." (Td. 127-128)). Finally, one evening, in the summer of 1977, Kahana told Golin that he was going to see Usha Mallik, a female graduate student at Brookhaven, because Mallik was "more willing" than Golin. (Tp. 56-57). (Kahana "do[es]n't remember the name [Usha] Mallik ever came up." (Td. 124)). After the Mallik incident, Golin attempted to avoid Kahana as much as reasonably possible. (Td. 110, 140).

Kahana then told Golin that she should be flattered by his advances, (Pl. Ex. 10, Tp. 67, App. 60a), and should be "more realistic", as there were not enough jobs in her field. (Tp. 57). Kahana further discouraged Golin from attempting to remain at Brookhaven, and told her that she should seek employment with other groups that did similar work at Argonne National Laboratory, in Chicago, and elsewhere. (Tp. 58, Td. 118).

At trial, Dr. Evelyn H. Monsay, a former applicant for employment at Brookhaven, testified that during a seminar at the Laboratory, Kahana sat next to her, repeatedly nudged her with his foot and with his knee, leaned over her, and ostensibly moved his body towards her. Monsay had to withdraw repeatedly, to avoid Kahana, and she was upset and irritated by the time the seminar was over. (Tp. 126-127).

In December 1977, Kahana informed Golin that she would be discharged in October of the following year. (Tp. 60-61; Td. 118).

As soon as she was informed of Kahana's recommendation to terminate her, Golin contacted the Department Chairman's office, in an attempt to obtain redress. Because Samios, the Department Chairman, was not in his office, Golin reported to his secretary, Ms. Helen Streeter, everything that had been happening between her and Kahana. (Tp. 61). Streeter assured Golin that she would report everything to Samios, and that she would also convey to the Chairman Golin's request for an unbiased review of her professional qualifications. (Id.).

One or two days later, in December 1977, Golin returned to Samios' office. At a meeting where Blume was also present, Samios told Golin that "he knew ev-

erything [she] had been going through." (Tp. 61). Samios advised Golin to "go back to work and relax", as he and Blume "would investigate and do the best for [her] career." (Tp. 62).

However, on February 1, 1978, Samios and Blume told Golin that they had reviewed Kahana's recommendation, and saw no reason either to promote her or to renew her contract with the Physics Department. The review of Kahana's recommendation consisted in Samios and Blume asking the opinions of Dr. Joseph Weneser and Dr. Carl Dover, Kahana's long-time friends and close associates at Brookhaven. (Td. 29-32, 52-53). Blume, also a personal friend of Kahana's, (Td. 136), "looked at a few of [Golin's] papers" and concluded that "she was a reasonable scientist, but there was no reason to promote her to the scientific staff." (Td. 66). Samios "took a look at

several of [Golin's] publications, but not in great depth", (Td. 32), and his evaluation was "consonant with the opinions of Dr. Weneser, Dr. Dover and Dr. Kahana." (Id.). Weneser and Dover did not testify at trial.

Standard objective criteria for rewarding scientists in industry and academe are: productivity, measured by the number of professional publications, and originality, measured by the interest the individual's work has generated, i.e., by the science citation analysis. (Td. 47, 54; Tp. 62-63).

Dr. D. John Millener had been hired by the Nuclear Theory Group at the same time as Golin. Millener's initial, two-year, temporary staff appointment was due to expire at the same time time as Golin's temporary Research Associate appointment. Although Golin's objective professional qualifications were superior

to Millener's, (Tp. 62-63; Pl. Ex. 17, Tp. 135, 143-144, App. 74a-75a), Golin was terminated, while Millener was promoted to the highest temporary staff level, upon Kahana's recommendation. (Td. 43-44).

Following the February meeting with Samios and Blume, Golin attempted to obtain a transfer to a different group at Brookhaven. (Tp. 64, 103, 148; Td. 70). Since the Laboratory did not advertise professional vacancies, but followed a practice of "word-of-mouth" recruiting, (Td. 45; Tp. 70-71, 103), Golin relied on Blume's offer to find her a suitable new position at Brookhaven. (Td. 32-33, 70, 72). However, approximately half a year later, Blume had been unable to find any alternative employment for Golin. (Tp. 64).

Brookhaven was hiring hundreds of physicists during the period of time

relevant to this litigation, (Tp. 148), and had numerous openings for which Golin was qualified. (Td. 72-73). The defendant does not allege that the male physicists it hired were in any way more qualified than Golin.

At the end of June 1977, Golin first informed Samios and Blume that she intended to make a formal charge of sexual harassment against Brookhaven, and contact the Affirmative Action officer of the Department of Energy who was visiting the Laboratory. (Td. 73).

On July 1, 1978, Golin also wrote a letter to Dr. George H. Vineyard, the Laboratory Director, reporting to him Kahana's sexual harassment. (Pl. Ex. 10, Tp. 67, App. 58a-61a).

One month later, Vineyard replied to Golin's letter. (Def. Ex. D, Tp. 100, App. 63a-65a). He informed Golin that the Research Associate positions were intend-

ed to be temporary appointments, and that since Kahana's recommendation had been reviewed by other senior staff physicists, no remedial action would be considered by Brookhaven. He added that Golin's "serious charge" against Kahana would be investigated. (Id., App. 65a).

No investigation was performed, beyond Samios and Blume asking Kahana whether he had "sexually harassed" Golin. Upon Kahana's denial, no efforts were undertaken by Brookhaven to determine whether Golin's allegations were true. (Td. 36-38, 75).

Nor is it claimed that any corrective action was taken against Kahana from December 1977, when Samios told Golin that "he knew everything [she] had been going through", (Tp. 61), until December 1983, when the bench trial was concluded below.

Upon the termination of her

contract, Golin continued to work at Brookhaven without a salary for approximately one year. (Tp. 65). Then, without any assistance from Samios or Blume, Golin obtained industrial employment as a senior computer programmer/analyst. (Tp. 64).

C. Statement of disputed facts.

The above facts are undisputed by the parties, but several facts are in dispute.

Samios, who was Chairman of the Physics Department in 1977, alleges that Millener was promoted upon Kahana's recommendation that Millener showed "promise" and "was a bright individual." (Td. 44). Kahana claims that Millener was appointed to the highest temporary staff position because "there was some technical difficulty about his visa", (Td. 116), a "situation probably better

understood by the chairmanship." (Id.).

Samios claims that Baltz was promoted from Research Associate to staff upon Kahana's recommendation that Baltz showed "promise" and "originality". (Td. 23). However, Baltz was subsequently refused tenure at Brookhaven, (Td. 100), where this position constitutes "recognition of independent accomplishment of a high order in the performance of original research or of other intellectually creative activity appropriate to the purposes of the Laboratory." (Scientific Staff Manual, Def. Ex. A, p.4, Tp. 75). (Emphasis added).

Golin contends that Brookhaven prevented her from obtaining a transfer at the Laboratory in retaliation for her opposition to Kahana's sexual harassment. (Tp. 63-64, 147-148; Schedule E, Pretrial Stipulation of Contested Issues of Fact and of Law, App. 56a-57a). Blume claims

that Golin was uninterested in the employment opportunities he discussed with her. (Td. 72-73).

D. Summary of the holdings below.

Petitioner filed suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., ("Title VII"), claiming that Brookhaven discriminated against her on the basis of her sex, and retaliated against her for opposing her supervisor's sexual harassment. (Schedule E, Pretrial Stipulation of Contested Issues of Fact and of Law, App. 56a-57a).

After a 4-day non-jury trial, during which the District Court heard testimony from petitioner, Bets, Monsay, Samios, Blume and Kahana, the Court dismissed the complaint "on the merits, for failure to establish a prima facie case of employment discrimination under Title VII of

the Civil Rights Act of 1964, as amended." (Memorandum and Order dated January 26, 1984, Conclusions of Law #14, App. 38a).

The Court of Appeals for the Second Circuit summarily affirmed, without an opinion, the decision of the Trial Court. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AS TO THE PROPER INTERPRETATION OF THE PHRASE "PRIMA FACIE CASE" IN THE TITLE VII CONTEXT

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981), this Court unanimously reaffirmed and emphasized the proper interpretation of the phrase "prima facie case" in the Title VII context:

> "The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. McDonnell Douglas should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (Citation omitted).

At the close of plaintiff's case in

chief in the District Court below, the defendant moved for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, (App. 45a), on the ground that the plaintiff had failed to establish a prima facie case of employment discrimination under Title VII. (Tp. 115-120). The defendant's motion was denied by the District Court, and the trial resumed with the testimony of the defendant's witnesses. (Td. 1-142).

According to this Court's holding in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-715 (1983), "when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the

meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case', 450 U.S., at 255, n.10, and the 'factual inquiry proceeds to a new level of specificity.' Id., at 255." (Footnote omitted; emphasis added).

However, after having denied the defendant's motion to dismiss, and having permitted the defendant to offer evidence in support of its allegedly legitimate reason for plaintiff's rejection, the District Court below ruled that:

> "The Complaint herein must be dismissed on the merits for failure to establish a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended." (Conclusions of Law #14, App. 38a).

This decision was summarily affirmed by the Court of Appeals for the Second Circuit. (App. 1a-2a).

The ruling of the two federal courts below as to plaintiff's failure to

establish a prima facie case in the Title VII context squarely conflicts with this Court's well-established views. See, e.g., United States Postal Board of Governors v. Aikens, 460 U.S. 711, 714-715 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-805 (1973).

In this case, as in Aikens, "[t]he District Court *** erroneously focused on the question of prima facie case rather than directly on the question of discrimination. Thus we cannot be certain that its findings of fact in favor of the [employer] were not influenced by its mistaken view of the law." Aikens, 460 U.S., at 717 (emphasis added).

An examination of the record below plainly shows that the most relevant and critical of the District Court's findings

of fact are so totally unsupported by the evidence as to result in a denial of justice.

Moreover, the undisputed evidence in this record abundantly "show[s] that [the employer]'s stated reason for [plaintiff]'s rejection was in fact pretext." McDonnell Douglas, 411 U.S., at 804.

For all the foregoing reasons, petitioner prays that the Court grant this petition for a writ of certiorari and review the judgment below.

2. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO A PLAINTIFF'S CAUSE OF ACTION UNDER TITLE VII FOR A SUPERVISOR'S SEXUAL HARASSMENT

A. The decision below raises the significant and recurring question whether sexual harassment in employment is unlawful under Title VII.

Sexual harassment "refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power." C. A. MacKinnon, Sexual Harassment of Working Women 1 (1979).

"[S]exual harassment continues to be especially widespread." EEOC's Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Interim Interpretive Guidelines, 45 Fed. Reg. 25024 (1980).

"[E]ven extrapolating conservatively, given that nine out of ten American women work outside the home some time in their lives and that in April 1974, 45 percent of American women sixteen and over, or 35 million women, were employed in the labor force, it is clear that a lot of women are potentially affected. As the problem begins to appear structural rather than individual, Redbook's

conclusion that 'the problem is not epidemic; it is pandemic - an everyday, everywhere occurrence' does not seem incredible." C. A. MacKinnon, Sexual Harassment of Working Women 27 (1979) (footnotes omitted).

The courts and the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.1-1604.11 (1984), ("Guidelines"), have defined sexual harassment as follows:

> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Id., at § 1604.11(a).

To date, seven courts of appeals, in agreement with the EEOC Guidelines, 29 C.F.R. § 1604.11(a)-(c), (App. 49a-51a), have ruled that the sexual harassment of an employee by her supervisor is a violation of § 703 of Title VII. Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599 (CA7 1985); Vinson v. Taylor, 753 F.2d 141 (CADC 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (CA3 1983); Katz v. Dole, 709 F.2d 251 (CA4 1983); Henson v. City of Dundee, 682 F.2d 897 (CA11 1982); Miller v. Bank of America, 600 F.2d 211 (CA9 1979); Simmons v. Lyons, 746 F.2d 265 (CA5 1984).

These decisions are based on the established Title VII principle that employers are vicariously liable for any racial, religious or national origin harassment of subordinate employees by supervisory personnel. See, e.g., Firefighters Institute for Racial

Equality v. City of St. Louis, 549 F.2d 506, 514-515 (CA8), cert. denied, 434 U.S. 819 (1977) (segregated employee eating clubs approved by supervisors, even though neither organized nor regulated by the employer, violate Title VII); Young v. Southwestern Savings and Loan Association, 509 F.2d 140, 144 n.7 (CA5 1975) (employer responsible under Title VII for supervisor's religious harassment of employee, even though supervisor lacked actual authority to fire, and employer had no opportunity to correct the problem); see also, e.g., Compston v. Borden, Inc., 424 F.Supp. 157, 160-161 (SD Ohio 1976) (demeaning religious slurs by supervisor violate Title VII); Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 128 (CA5 1979) (defendant cannot escape responsibility for supervisor's racial discrimination even though supervisor had

no actual authority to fire employee); Anderson v. Methodist Evangelical Hospital, 464 F.2d 723, 725 (CA6 1972) (employer liable under Title VII for supervisor's racially discriminatory discharge of employee, despite employer's "outstanding record in regard to fair and impartial treatment of the races"); see also EEOC Guidelines, 29 C.F.R. § 1604.11, at 138, n.1 (1984).

In applying these well-established Title VII principles to sexual harassment, the courts and the EEOC rely on the Congressional judgment that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." House Report No. 92-238, U.S.Code Cong. & Adm. News, 2137, 2141 (1972).

Yet, the two federal courts below

have been reluctant to accept the proposition that the sexual harassment of an employee by her supervisor is unlawful under Title VII.

Even though this decision has not been reported, similar views are held by other federal and state courts. See, e.g., Fisher v. Flynn, 598 F.2d 663, 665 (CA1 1979) (university not liable for alleged conduct of a department chairman in conditioning a female professor's continued employment on her acquiescence to his sexual advances, because "[there was] no sufficient nexus between her refusal to accede to the romantic overtures and her termination"). See also, e.g., State University of New York at Albany v. State Human Rights Appeal Board, 37 FEP Cases 1806, 1808 (New York Supreme Court, Appellate Division, Third Department 1981) ("[t]he doctrine of respondeat superior, holding an employer

liable for the acts of his employees in the course of their employment, has not been accepted in cases involving sex discrimination (cf. Alexander v. Yale Univ., 2 Cir., 631 F.2d 178). There is an affirmative burden on the complainant to prove that the employer either had knowledge or acquiesced in the discriminatory conduct of a supervisor ***.").

Petitioner respectfully submits that the Congressional purpose should not be frustrated in this manner, and that additional, expensive and time-consuming litigation should be avoided. Therefore, it is vital that this significant and recurring employment discrimination question be definitively resolved by this Court.

B. The decision below is in direct conflict with the decisions of other courts of appeals as to an employer's liability for the offensive work environment

created by a supervisor's sexual harassment.

In the Memorandum and Order dated January 26, 1984, the District Court below did not undertake a determination on whether any sexual harassment had occurred. The Court rendered judgment for the defendant on the grounds that "[p]laintiff has failed to establish a prima facie case of sexual harassment predicated on the maintenance of a hostile work environment, because she has failed to establish that Dr. Kahana's superiors at Brookhaven in any way condoned or acquiesced in his alleged sexual harassment." (Conclusions of Law #9, App. 33a-34a).

The Court of Appeals for the Second Circuit affirmed this decision. (App. 1a-2a).

The ruling below is in direct conflict with the appellate decisions in

Vinson v. Taylor, 753 F.2d 141 (CADC 1985); Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599 (CA7 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (CA3 1983); and Miller v. Bank of America, 600 F.2d 211 (CA9 1979).

Moreover, the uncontroverted evidence in this record makes plain that Golin proved Brookhaven's maintenance of a hostile and offensive work environment even under the most stringent liability standard adopted by the Trial Court. See, e.g., Henson v. City of Dundee, 682 F.2d 897 (CA11 1982).

In Henson, the Eleventh Circuit had made a distinction between "harassment that creates an offensive environment ('condition of work') and harassment in which a supervisor demands sexual consideration in exchange for job benefits ('quid pro quo')." 682 F.2d, at 908, n.18. The Eleventh Circuit held that even

though "[i]n the classic quid pro quo case an employer is strictly liable for the conduct of its supervisors, *** in the work environment case the plaintiff must prove that higher management knew or should have known of the sexual harassment before the employer may be held liable." Henson, 682 F.2d, at 910.

In support of these views, the Eleventh Circuit cited Bundy v. Jackson, 641 F.2d 934, 943 (CADC 1981) and Vinson v. Taylor, 23 FEP Cases 37, 42 (DC 1980). However, the latter has been overruled. In Vinson v. Taylor, 753 F.2d 141 (CADC 1985), quite contrary to the Eleventh Circuit's interpretation of Bundy and Vinson, the Court of Appeals for the District of Columbia made plain that the employer is vicariously liable for any sexual harassment perpetrated by a supervisor on a subordinate employee. Vinson, 753 F.2d, at 148-152.

The Vinson Court relies in part on § 1604.11(c) of the EEOC Guidelines, 29 C.F.R. §§ 1604.1-1604.11 (1984) which are unambiguous on the subject. Since the EEOC Guidelines do not conflict with earlier pronouncements of the agency, nor with other administrative interpretations of the statute, nor with legislative history, General Electric Co. v. Gilbert, 429 U.S. 125, 145 (1976), they are "entitled to great deference." Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979). The District of Columbia Circuit, therefore, properly "attach[ed] considerable weight to this interpretation [of Title VII] ***." Vinson, 753 F.2d, at 149; see also id., at 148 n.60.

Vinson further emphasized that vicarious employer responsibility is not limited to unlawful discrimination by supervisors vested with full authority to hire, to promote or to fire, and that

"employers must answer for sexual harassment of any subordinate by any supervising superior." Vinson, 753 F.2d, at 150 (footnote omitted).

The Trial Court below based its Conclusion of Law #9 on a number findings of fact and legal arguments. Each of the Court's legal arguments is in direct conflict with the holding of a federal court of appeals that has considered the matter. Additionally, the most critical and relevant findings of fact are so totally unsupported by the record as to result in a denial of justice.

The Trial Court states that "as established in the findings of fact, Dr. Golin did not complain to Dr. Kahana's superiors at Brookhaven until after she was informed of their decision to sustain the employment determinations initially made by the Nuclear Theory Group." (Conclusions of Law #9, App. 34a).

(Emphasis added).

This conclusion is in direct conflict with the views of the Court of Appeals for the District of Columbia in Vinson v. Taylor, 753 F.2d 141, 148-152 (CADC 1985).

According to Vinson, "an employer *** is responsible for its acts and those of its *** supervisory employees with respect to sexual harassment regardless of whether *** the employer knew or should have known of their occurrence." Vinson, 753 F.2d, at 149 (footnote omitted), quoting the EEOC Guidelines, 29 C.F.R. § 1604.11(c). Therefore, the timing of Golin's complaint to upper management, and even the fact that she made such a complaint, are immaterial to Brookhaven's liability for the discriminatory acts of Golin's supervisor.

Furthermore, contrary to the Trial Court's finding, it is undisputed here

that as soon as she was notified by Kahana of his recommendation to discharge her, Golin complained about the sexual harassment to Samios' secretary, and, one or two days later, in December 1977, Samios told Golin that "he knew everything [she] had been going through". (Tp. 60-61). Samios and Blume admittedly sustained Kahana's employment decision only in February 1978, about two months after Golin's complaint. (Td. 28-32, 69).

The District Court further holds that "[e]ven crediting Dr. Golin's versions of the facts, she made no complaint of sexual harassment to Dr. Samios and Dr. Blume until at least six months after the alleged sexual harassment had ceased." (Conclusions of Law #9, App. 34a). (Emphasis added).

The Court's conclusion that Golin is barred from relief for having postponed her complaint to the employer's upper

management is in direct conflict with the decision of the Court of Appeals for the Third Circuit in Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80 (CA3 1983).

According to Craig, "[the corporation] suggests that Tomkins [v. Public Service Electric & Gas Co., 568 F.2d 1044 (CA3 1977)] imposed a requirement that an employer have actual or constructive knowledge of the sexual harassment at the time the advance was made. Nothing in Tomkins imposes such an unreasonable burden on an employee." Craig, 721 F.2d, at 80 (citation omitted).

Finally, the record does not support the Court's findings of fact. Even though Golin did attempt to avoid Kahana as much as reasonably possible, (Tp. 91-93, 98; Td. 110, 140), Golin continued to work with Kahana until November 1977. (Tp. 91-93, 98). It is undisputed that approximately one month later, Golin complained

to Samios' secretary about the sexual harassment. (Tp. 60-61). Therefore, the Court's finding that "even crediting Golin's versions of the facts" the harassment "had ceased" six months earlier is not supported by the record below.

In the view of the Trial Court, "although a showing of pervasive harassment can in an appropriate case give rise to a finding of constructive knowledge, Henson v. City of Dundee, supra, 682 F.2d at 905, no such showing of pervasive harassment was made here. The findings of fact herein establish that, even crediting Dr. Golin's testimony, no other employee experienced such harassment or voiced any complaint." (Conclusions of Law #9, App. 34a-35a). (Emphasis added).

Although Dr. Evelyn H. Monsay's testimony that she was sexually harassed by Kahana at Brookhaven (Tp. 126-127) is not in dispute, the District Court

apparently disregards this fact on the ground that Monsay was an applicant for employment at Brookhaven, and not a Brookhaven employee.

Such a narrow interpretation of Title VII conflicts with the principles established by other circuits. See, e.g., Rogers v. EEOC, 454 F.2d 234 (CA5 1971), cert. denied, 406 U.S. 957 (1972).

Furthermore, as the Court of Appeals for the District of Columbia Circuit pertinently noted in Vinson v. Taylor, 753 F.2d 141, 151-152 (CADC 1985), "[a] requirement of knowledge by the employer of Title VII transgressions by supervisory personnel would effectively eliminate vicarious Title VII responsibility altogether. It would reserve Title VII liability for only those employers who fail to redress known violations - a direct, not a substitutional, theory of attribution. This would be a retreat from

the level of protection Title VII has consistently and designedly afforded, and take a backward step we refuse to endorse." (Footnote omitted; emphasis added).

The District Court below further finds against the plaintiff on the grounds that "[the Brookhaven officials'] efforts to investigate Dr. Golin's charges and, if necessary, to remedy her allegations were thwarted by Dr. Golin's own refusal to cooperate with Brookhaven's investigation." (Conclusions of Law #9, App. 35a). (Emphasis added).

The District Court's interpretation of Title VII as requiring the plaintiff to exhaust company remedies squarely conflicts with the views of the Court of Appeals for the Ninth Circuit in Miller v. Bank of America, 600 F.2d 211 (CA9 1979).

In Miller, a sexual harassment case,

the Ninth Circuit "decline[d] to read an exhaustion of company remedies requirement into Title VII." 600 F.2d, at 214. The Ninth Circuit based its decision on the Supreme Court holdings in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-799 (1973) and Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974), and it reasoned in accordance with the well-established principle that "when an employee accuses a union of discrimination in violation of Title VII, the employee need not exhaust union remedies as a pre equisite to suit." Miller, 600 F.2d, at 214 (citations omitted).

The Miller viewpoint is especially appropriate in the sexual harassment context, where "the imbalance of power between harassing supervisor and harassed employee can impede the effectiveness of internal remedies ***." Note, Sexual

Harassment Claims . . Abusive Work Environment Under Title VII, 97 Harvard Law Review 1449, 1462 (1984); see also id., at 1462, n.68.

Moreover, the District Court's findings of fact are not supported by any evidence whatever. Despite its reassuring comments to Golin, Brookhaven admittedly made no efforts to investigate whether Golin's allegations were true, beyond asking Kahana whether he had sexually harassed her. And, while Brookhaven does not claim that Golin refused to cooperate with its pretrial discovery in these proceedings, no corrective action against Kahana has been alleged. As noted in Heelan v. Johns-Manville Corp., 451 F.Supp. 1382, 1389 (D Colo. 1978), a single call to the alleged perpetrator for verification or denial is not an investigation. Furthermore, as the Michigan District Court accurately

observed, "[t]he failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior." Munford v. James T. Barnes & Co., 441 F.Supp. 459, 466 (ED Mich. 1977).

C. The decision below is in direct conflict with the decisions of other courts of appeals as to an employer's liability for a supervisor's imposition of sexual consideration as a quid pro quo for employment benefits.

In its Conclusions of Law #8, (App. 32a), the District Court below holds that "[p]laintiff has failed to establish a prima facie case of sexual harassment resulting in a tangible detriment to her employment because she failed to establish that such harassment resulted in an adverse employment decision."

The reasoning of the Trial Court, summarily affirmed by the Second Circuit, is in direct conflict with the appellate

views in Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599 (CA7 1985); Henson v. City of Dundee, 682 F.2d 897 (CA11 1982); and Miller v. Bank of America, 600 F.2d 211 (CA9 1979).

In Horn, without concerning itself with the presence or absence of any tangible job detriment, the Seventh Circuit held "that Title VII prohibits an employer, acting through one of its supervisory employees, from imposing sexual consideration as a condition of employment." 755 F.2d, at 603 (footnote omitted). The Court focused on the fact that "[b]ecause of her sex, ***, [plaintiff] was disadvantaged by pressure to submit to an additional, humiliating condition of employment that served no legitimate purpose of the employer." Horn, 755 F.2d, at 604 (emphasis added). Therefore, in agreement with section 1604.11(a)(1) of the EEOC Guidelines,

(App. 49a), the Seventh Circuit concluded that this condition alone was a violation of Title VII. The Court, moreover, adopted the EEOC's strict liability rule codified at 29 C.F.R. § 1604.11(c), (App. 50a), pointing out that the EEOC's judgment was "both persuasive and supported by precedent." 755 F.2d, at 604, n.6.

In Henson v. City of Dundee, 682 F.2d 897 (CA11 1982), the Eleventh Circuit addressed simultaneously the two quid pro quo forms of sexual harassment defined by the EEOC, 29 C.F.R., at §§ 1604.11(a)(1) and 1604.11(a)(2), and similarly held that "[a]n employer may not require sexual consideration from an employee as a quid pro quo for job benefits." Henson, 682 F.2d, at 908 (citations omitted; footnote omitted). More explicitly, where "[t]he acceptance or rejection of the harassment by an

employee [is] an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment", 682 F.2d, at 909, the employer is vicariously liable for the conduct of any offending supervisor. Id.; see also 29 C.F.R. § 1604.11(c). The Eleventh Circuit reasoned that "the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. Therein lies the quid pro quo. *** [Therefore,] his conduct can fairly be imputed to the source of his authority." Henson, 682 F.2d, at 910 (footnote omitted) (emphasis added); see also id., at 911 n.22.

At the trial below, the supervisor did not deny that he subjected Golin to sexual advances, sexual remarks, and requests for sexual favors. (Tp. 55-57; Pl. Ex. 10, Tp. 67, App. 60a; Td. 107 ("I don't remember any such advances.")). Nor that he discouraged Golin from attempting

to remain at Brookhaven, telling her to be "more realistic" as there were not enough jobs in her profession. (Tp. 57-58). Furthermore, it is undisputed that as a Group Leader, Kahana had the authority to recommend all the employment decisions affecting his subordinates. (Td. 8-10, 23, 25, 44, 101, 115-116).

Therefore, quite apart from any tangible job detriment issue, Golin was disadvantaged at Brookhaven by "pressure to submit to an additional, humiliating condition of employment that served no legitimate purpose of the employer", Horn, 755 F.2d, at 604, and for which the employer is strictly liable. Id.; see also Henson, 682 F.2d, at 910.

Moreover, the record abundantly shows that Golin also suffered a tangible detriment to her employment as a consequence of her rejection of Kahana's sexual advances.

Indeed, it is uncontroverted here that at the expiration of Millener's and Golin's original, temporary appointments, Millener was promoted while Golin was terminated, even though Golin possessed higher objective professional qualifications than Millener. (Tp. 62-63; Pl. Ex. 17, Tp. 135, 143-144, App. 74a-75a). Upon Golin's complaint to upper management, Kahana's employment recommendation was only reviewed by Kahana's admitted friends and long-time associates at Brookhaven. (Td. 29-32, 52-53, 136). Additionally, it is undisputed that Brookhaven's underutilization of women scientists was documented both by the Department of Energy federal contract compliance review and by the Laboratory's Affirmative Action Plan, (Def. Ex. E, Tp. 101, App. 68a; see also Def. Ex. G, Td. 35-36, App. 72a), and it is admitted that "much remain[ed] to be done" at

Brookhaven "to achieve equality of opportunity" for professional women. (Def. Ex. G, Td. 35-36, App. 72a-73a).

All the foregoing facts necessarily show that the allegation made by senior Brookhaven physicists that "Golin was a reasonable scientist but there was no reason to promote her to the scientific staff", (Td. 66), which is here "[the employer]'s stated reason for [the plaintiff]'s rejection was in fact pretext." McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973).

The District Court found against the plaintiff on the grounds that "Dr. Golin had no reasonable expectation of the appointment extension or promotion she sought". (Conclusions of Law #8, App. 32a-33a). This conclusion is squarely contradicted by Samios' admission that "it [was] reasonable for [Research Associates at Brookhaven] to assume that

there [was] a chance or possibility that they [would] remain at the Laboratory". (Td. 55).

Additionally, the District Court held that "[p]romotions from Research Associate to the regular staff, especially in the Nuclear Theory Group, were exceedingly rare (less than one in ten candidates) ***", (Conclusions of Law #8, App. 33a), a finding based on no evidence whatever, since no data on the number of promotions in the Nuclear Theory Group were produced at trial, "and were given only to exceptionally qualified individuals, which Dr. Golin was not", (id.), a finding unsupported by the record.

The defendant does not even contend that Baltz, one of the Research Associates who was granted such a promotion in the Nuclear Theory group, was exceptionally qualified. Samios simply claims that "the case was made [by

Kahana] on Baltz' promise" and "originality". (Td. 23). However, Baltz was subsequently denied tenure at Brookhaven, (Td. 100), and therefore, he lacked any "independent accomplishment of a high order in the performance of original research or of other intellectually creative activity ***." (Scientific Staff Manual, Def. Ex. A, p. 4, Tp. 75). (Emphasis added).

The District Court further states that "since the decisions not to grant a third year extension or to promote Dr. Golin to the Physics Department's staff were independently reviewed and ratified by persons who had no involvement in, or at that time knowledge of, the alleged sexual harassment, there is no basis to find that Dr. Golin's response to the harassment, if it occurred, resulted in an adverse employment decision as to her." (Conclusions of Law #8, App. 33a).

(Empasis added).

The Trial Court's findings are so totally unsupported by the evidence as to result in a denial of justice.

Indeed, it is uncontroverted here that Kahana's employment decision was ratified by Samios and Blume in February 1978, after consultation with Weneser and Dover. (Td. 32, 66). However, contrary to the District Court's finding, Samios undisputedly told Golin in December 1977, before undertaking any review of Golin's work, that "he knew everything [she] had been going through" (Tp. 61); Blume was unable to remember what was said at that December meeting (Td. 82); and there is not a scintilla of evidence in the record permitting one to infer that either Weneser or Dover lacked knowledge of Golin's sexual harassment complaint when they allegedly reviewed Golin's work. Moreover, the defendant's testimony

establishes that Blume, Weneser and Dover were Kahana's personal friends and close, long-time associates at Brookhaven. (Td. 29-32, 52-53, 136).

A very different judicial response was prompted by similar circumstances in the racial discrimination context.

In Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 128 (CA5 1979), "the supervisor of custodial employees, using racial epithets, told [plaintiff] that she was fired. Defendant [could not] escape responsibility for the act of the supervisor on the ground that under institutional procedures not proved to be known to the plaintiff, only the president could fire an employee of the college."

Similarly, in Tidwell v. American Oil Company, 332 F.Supp. 424, 435 (D Utah 1971), despite the fact that the offending supervisor had "called in

nearly every other person in any supervisory capacity for consultation about [plaintiff's termination]", the employer was held vicariously liable for the supervisor's racially discriminatory acts. Id., at 436.

Furthermore, the views of the Trial Court below are in direct conflict with the decision of the Ninth Circuit in Miller v. Bank of America, 600 F.2d 211 (CA9 1979). In Miller, the Ninth Circuit held that "respondeat superior does apply here, where the [sexual harassment] action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions ***." 600 F.2d, at 213 (emphasis added); see also Henson v. City of Dundee, 682 F.2d 897, 910 (CA11 1982).

Finally, as the Ninth Circuit pertinently recognized in Miller, "Title

VII itself, 42 U.S.C. § 2000e(b), defines 'employer' to include 'any agent of such a person' (i.e., employer)." 600 F.2d, at 213 (emphasis added).

For all the foregoing reasons, a grant of certiorari should issue to review the judgment below.

3. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S LONG-SETTLED PRACTICE TO REQUIRE A TRIAL COURT TO MAKE FINDINGS

In both courts below, the petitioner alleged that the employer discriminated against her on the basis of her sex, and retaliated against her for opposing her supervisor's sexual harassment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII").

The first paragraph of the District Court's Memorandum and Order dated

January 26, 1984 (App. 3a) makes plain that the Court only considered the plaintiff's sex discrimination claim.

The District Court did not address plaintiff's additional claim that in retaliation for her sexual harassment complaint, the employer prevented her transfer to any other group at the Laboratory. (Tp. 64, 67; Schedule E, Pretrial Stipulation of Contested Issues of Fact and of Law, App. 56a-57a).

The Court's findings are limited to the termination of plaintiff's employment in the Physics Department's Nuclear Theory Group. (Findings of Fact #14 and #27, App. 9a-10a; id., at 16a). Moreover, the finding that "[f]rom the Fall of 1977 through Dr. Golin's termination in December 1978, there was no vacancy in the Nuclear Theory staff to which Dr. Golin could have been promoted", (App. 16a), is not supported by the evidence.

Contrary to the Court's finding, the defendant does not claim that it denied Golin's promotion for lack of a vacancy in its Nuclear Theory staff. It is undisputed that at least two such vacancies existed at the time. (Td. 60, 89-90).

The Court of Appeals for the Second Circuit affirmed without an opinion the decision of the District Court, (App. 1a-2a), and its summary affirmance order supports petitioner's assertion that her retaliation claim has been overlooked below.

The failure of the two federal courts below to consider petitioner's retaliation claim represents a denial of justice.

Rule 52(a) of the Federal Rules of Civil Procedure (App. 47a) requires that the court in a bench trial "shall find the facts specially", and it is the

Supreme Court's long-settled practice to require detailed findings. See, e.g., Schneiderman v. United States, 320 U.S. 118, 130-131 (1943) ("we would be inclined to reverse and remand to the district court for the purpose of making adequate findings"); Kelley v. Everglades Drainage District, 319 U.S. 415, 422 (1943). See also, e.g., Anderson v. City of Albuquerque, 690 F.2d 796, 803 (CA10 1982); Denofre v. Transportation Insurance Rating Bureau, 532 F.2d 43, 45 (CA7 1976).

Section 704(a) of Title VII of the Civil Rights Act of 1964 (App. 44a) makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice" under Title VII (the "opposition" clause).

It is undisputed here that the petitioner opposed her supervisor's

sexual harassment and complained about it to her Department Chairman's office in December 1977, and to the Laboratory Director in July 1978. (Tp. 55-57, 60-61; Pl. Ex. 10, Tp. 67, App. 58a-62a). Seven courts of appeals that have addressed the matter agree with the EEOC that sexual harassment by supervisory personnel is unlawful under Title VII. Supra, at 29.

Furthermore, "[t]o fall under the protection of the opposition clause in § 704(a), behavior need not rise to the level of formal charges of discrimination. The opposition clause has been held to encompass informal protests, such as voicing complaints to employers ***." Armstrong v. Index Journal Co., 647 F.2d 441, 448 (CA4 1981) (citations omitted).

It is, therefore, beyond serious dispute that the petitioner's complaint to her employer's upper management was conduct protected by § 704(a) of Title

VII.

Finally, it is well established by now that in order to prove a retaliation claim, it is not necessary for the plaintiff to prove first the validity of the underlying discrimination claim. See, e.g., Love v. RE/MAX of America, Inc., 738 F.2d 383, 385 (CA10 1984); EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1013, n.2 (CA9 1983).

From all the undisputed evidence below, it necessarily follows that the respondent's allegedly legitimate reason for terminating Golin's employment, namely the claim that Golin lacked interest in the job opportunities discussed with her, is pretextual. (Td. 72-73). See, e.g., Franks v. Bowman Transportation Co., 495 F.2d 398, 419 (CA5 1974), rev'd on other grounds, 424 U.S. 747 (1976) (the alleged lack of interest in job vacancies on the part of

blacks "is singularly unpersuasive in view of [the employer]'s heavy reliance on word-of-mouth recruiting." 495 F.2d, at 419-420).

For all the foregoing reasons, the failure of the two federal courts below to consider petitioner's retaliation claim represents a denial of justice, and so clearly violates this Court's well-established practice to require findings as to justify the grant of certiorari to review the judgment below.

CONCLUSION

In the interest of justice, a writ of certiorari should issue to review the judgment of the Second Circuit.

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